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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1908.
No. 174.

KAIMIOLA NAKOOKOO GRAY,
Appellant,

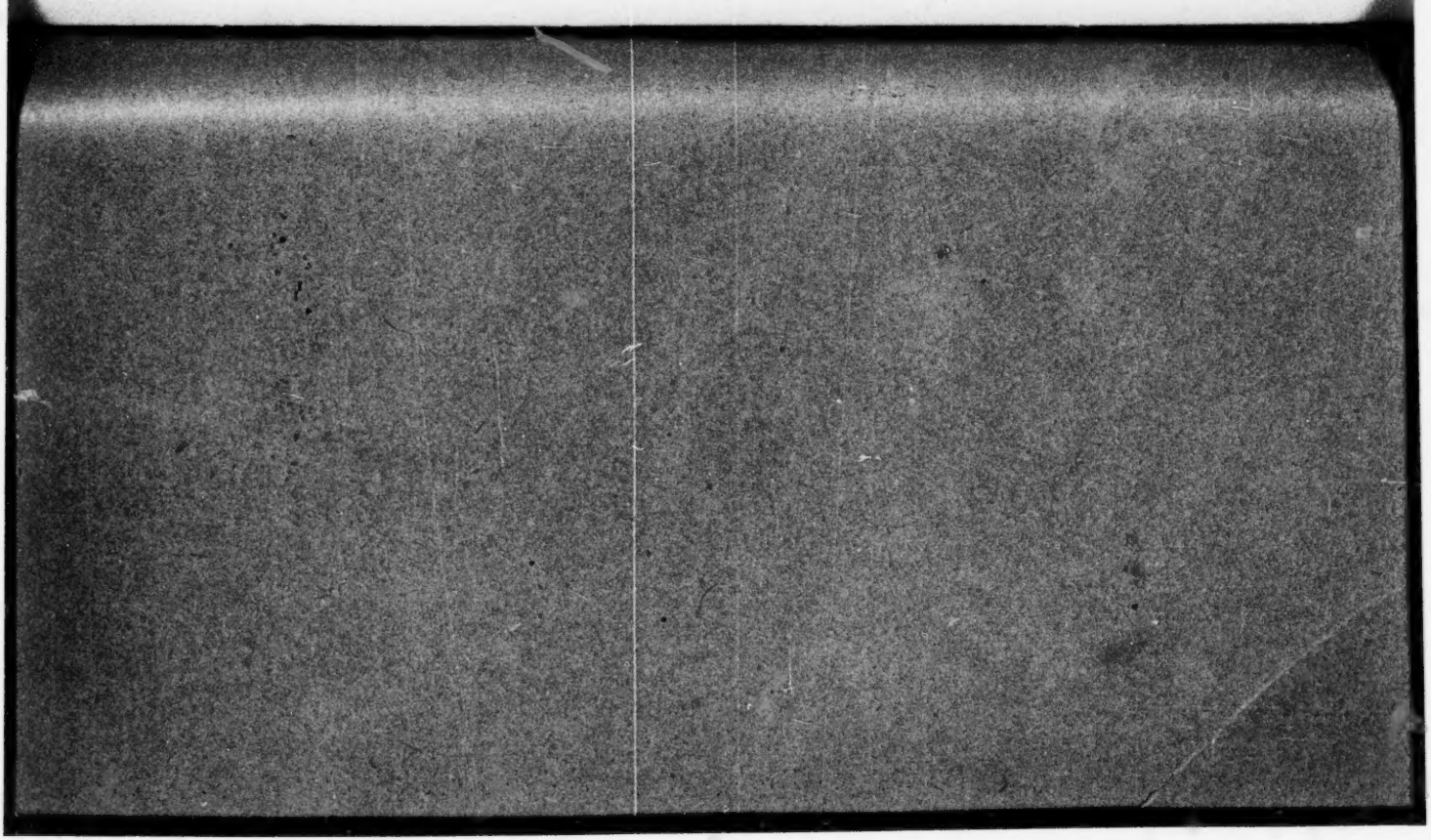
vs.

DAVID NOHOLOA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEE.

WILLIAM L. STANLEY,
CLARENCE H. OLSON,
HENRY HOLMES,
Attorneys for Appellee.



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BRIEF FOR APPELLEE.

This case came to the Supreme Court of the Territory of Hawaii upon appeal of the appellant herein from the decision of the Circuit Judge of the Circuit Court of the Second Circuit of the Territory, sitting in probate, refusing to appoint the nominee of the appellant herein administrator of the property as to which it was claimed by the appellant herein that one Hikaalani Hobron Noholoa, deceased, had died intestate. The will of the said deceased had already been admitted to probate and one Enoch Johnson appointed administrator with the will annexed. (R. pp. 22-24.)

The will admitted to probate was in the Hawaiian language, the translation of which as found by the probate judge at the hearing upon the petition for its admission to probate is as follows:

"I, the undersigned, a leper residing at Kalaupapa, Island of Molokai, Territory of Hawaii, do make this my Last Will for all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid, with good will (or intention,) do hereby bequeath the same as hereinafter described: One gray horse, one bay mare; one black mare; one frame wooden house and other houses owned by me, as well as all other property owned by me, to my husband David Noholoa, residing at Kalaupapa aforesaid, to him and to his heirs, admin-

istrators and executors forever. Renouncing all claims that my relatives may set up in law to this." (R. p. 24.)

It was claimed that this will devised the property of the deceased situate at Kalaupapa only and left intestate other property, both real and personal, situate elsewhere in the Territory. The Supreme Court of the Territory, holding that the will covered *all property wheresoever situated* belonging to the deceased, sustained the decision of the probate judge.

The appellant relies upon two grounds: one, that the will was not properly translated in the probate proceedings and that if properly translated it in terms would cover the property situate at Kalaupapa only; the other, that in any event the legal construction placed upon the translation adopted is erroneous.

ARGUMENT.

It is submitted on behalf of the appellee that the first ground is not open to the appellant upon this appeal.

In the first place, upon the hearing upon the appellant's petition, the translation of the will as found by the probate judge in the admission of the will to probate was offered in evidence by the appellant and is the only evidence offered upon the point at that hearing. (R. p. 6, line 25.) As that hearing was entirely independent of the proceedings for admission of the will to probate (in which also the translation adopted was uncontested), it follows as a matter of course that upon appeal, for the first time, a question as to the correctness of the translation could not be raised. The mere fact that the translation adopted was the only evidence offered upon the meaning of the will should in itself be conclusive against any attempt to secure a change in the translation upon appeal. The additional fact that that evidence was offered by the appellant herself is unquestionably conclusive upon the question.

In the second place, the translation of the will is purely a question of fact. That question has already been passed upon by two courts, the probate judge and the Supreme Court of the Territory, and upon the question both courts have reached the same conclusion. Therefore, in accordance with the practice of this court, so well settled as to make the citation of authorities upon the point unnecessary, the question has been finally settled and will not be considered by this court.

However, as counsel for appellant has urged the defectiveness of the translation at so much length in his brief, we shall consider the merits of that claim.

The first error assigned quotes the language of the decision of the Supreme Court of the Territory that the translation of the will is "evidently defective." (R. p. 56.)

This language of the court is as follows: "The original of the will shows more clearly than does the evidently defective translation that the intention was to dispose of *also* all the other property known to be mine." (R. p. 28.) This language does not, however, aid the contention of the appellant, for the court emphatically states that the original of the will shows more clearly than the translation the intention of the testator to devise all property belonging to her wherever situate. In other words the defect in the translation according to the court is in not showing as clearly as the original of the will the incorrectness of the construction urged by the appellant.

In support of a motion for a rehearing addressed to the Supreme Court of the Territory after its decision, the appellant produced a number of affidavits by persons purporting to be scholars of the Hawaiian language, which it is contended show the defectiveness of the translation. (R. pp. 29-49.)

These affidavits are ex parte and in any event are insufficient to support a reversal of the decision of the court below. We shall consider them in the order in which they appear in the record.

AFFIDAVIT OF FREDERICK W. BECKLEY (R. p. 32).

The deponent translates the final clause of the description of the property devised by the will "and all other *chattels* known to be mine" as opposed to the translation adopted by the court "as well as all other *property* owned by me." While admitting that the word "*waiwai*" used in the original of the will may be used to mean estate or property, real or personal, or both, the deponent concludes that because the word is preceded by the word "*nui*" denoting plurality, therefore the testator must have meant chattels. We submit, however, that the idea of plurality in itself does not establish the fact that real property was not included. The plural of the word property is as a matter of the use of English quite as applicable to real as to personal property.

The deponent relies also upon the word "*pono*" apparently assuming that the word denotes effects, and therefore by reference back to the word "*waiwai*" in the clause translated by him, "I hereby bequeath all of said effects of mine," indicates that the word "*waiwai*" was limited to chattels. That conclusion may be sound if the word "*pono*" is correctly translated

to mean effects in view of the fact pointed out in the affidavit, that the only property situate at the leper settlement that could have been owned by the testator would be personal property. The word "pono" does not refer to the word "waiwai" as used in the final clause of the description of the property devised where alone the translation of the word "waiwai" is of importance in the issues of this case. It therefore has no tendency to show that the word "waiwai" as there used was not intended to have a broader meaning including real property. If the word "waiwai" as there used is capable of meaning real as well as personal property, the statement of the deponent that it is evident that personal property at Kalaupapa only was to be disposed of is merely the opinion of the deponent as to the construction that should be placed upon the language of the will, which is a matter within the province of the court alone.

The affidavit does not therefore afford any ground for the contention of the appellant.

AFFIDAVIT OF C. L. HOPKINS (R. p. 35).

The deponent's translation does not differ in any material particular from the translation adopted by the court. The affidavit deals solely with the construction to be placed upon the language of the will so translated, a pure question of law upon which the court will not consider the opinion of any witness.

AFFIDAVIT OF EMMA M. NAKUINA (R. p. 37).

The deponent gives as her opinion, unsupported by any explanation or reason, that the will cannot be translated to include real estate. The statement that no property other than property at Kalaupapa is included in the language of the will is again a matter of legal construction and cannot be considered.

AFFIDAVIT OF A. M. POOPOE (R. p. 39).

The deponent admits that the word "waiwai" may include real and personal property, but states that the language of the will permits of but one interpretation, that the property devised is personal property situate at Kalaupapa only. The deponent's opinion is unsupported by explanation or reasons and is evidently an attempt to give a legal construction to the will, which is inadmissible.

AFFIDAVIT OF N. B. EMERSON, M.D. (R. p. 11).

The deponent admits that the word "waiwai" is capable of bearing the meaning "real estate" but as a matter of construction asserts that the word as used in the will is limited to personal property situate at Kalaupapa. In other words, admitting the translation adopted by the court, the deponent expresses his opinion upon the legal construction that should be placed upon the instrument. This the court cannot consider.

AFFIDAVIT OF J. S. EMERSON (R. p. 12).

The deponent's translation of the will is the same in effect as that adopted by the court and the deponent further expressly admits that the word "waiwai" used in the will may include all kinds of property, real as well as personal. The affidavit is merely an extended argument in favor of the view that the language of the will construed as a whole indicates the purpose of the testator to devise her personal property at Kalaupapa only. It is therefore of no value in support of the appellant's contention.

AFFIDAVIT OF HENRY SMITH (R. p. 16).

It can hardly be seriously contended that because this deponent has never seen a will in which the language used in this will was used to devise real estate, therefore it should be held that the language as used cannot include real estate. Possibly the deponent is quite as mistaken in his reading of other wills as we contend he is mistaken in the reading of this will. The only additional comment made in the affidavit is the expressed opinion of the deponent upon the construction of the instrument. It is for that reason inadmissible.

AFFIDAVIT OF J. ALFRED MAGOON (R. p. 17).

This is a hearsay statement of the translation made by a third person and states no reasons for the translation adopted.

Thus the affidavits upon which the appellant relies are contradictory upon the translation of the word "waiwai," some of them expressly admitting that the word is capable of the meaning attached to it in the translation adopted by the court. Clearly any expression of opinion upon the limitations upon the word by reference to the context of the will, will not be considered by the court, and it is clearly just as inadmissible

whether expressed in the form of *ex parte* affidavits or as in the testimony of Mrs. Fanny Babcock that the will witnessed by her conveyed personal property only. (R. p. 18.) The material upon which the appellant relies, therefore, in so far as it is material to the question in issue is conflicting at the best and therefore cannot justify the adoption of a translation different from that adopted by the courts below.

LEGAL CONSTRUCTION OF TRANSLATION ADOPTED.

The question presented to this court therefore resolves itself into one of the legal construction of the translation offered originally to the probate judge by the appellant herself at the hearing upon her petition and adopted both by the probate judge and the Supreme Court of the Territory. In the consideration of that question, other decisions afford but slight, if any, assistance.

The Supreme Court of the Territory held that the final clause of the description of the property devised is general and unrestricted and therefore includes all property that belonged to the testator at the time of her death wheresoever situate.

Stripped of unessentials, the will reads as follows:

A. I make my will for my property at Kalaupapa

B. and devise

1. the same described as follows: one gray horse, one bay mare, one black mare, one frame wooden house and other houses owned by me,
2. as well as all other property owned by me

C. to my husband David Nahoa.

The appellant's case rests upon the contention that the clause "as well as all other property owned by me," is restricted by the opening recital of the will "I make my will for my property at Kalaupapa" to property at Kalaupapa. That contention overlooks two vital features of the will.

In the first place, the will is inartistically drawn. It cannot be said that the recital was made for the purpose of restricting the purport of the will. On the contrary, it most probably represents merely what was uppermost and specifically in the mind of the testator, namely, the articles of property immediately surrounding her, which were movable in their nature and therefore called for specific description.

In the second place, the recital is immediately followed by the devise of the property in Kalaupapa referred to in the recital by a general reference back to the recital which is then followed by a specific description showing what the testator's property in Kalaupapa consisted of. When the specific description of the property in Kalaupapa already referred to in a general term, is completed, the testator adds another general clause "as well as all other property owned by me." In itself, the clause is unrestricted and would be sufficient to cover all property belonging to the testator wherever situated. That it is not restricted by the opening recital of the will is, we submit, unquestionable, because prior to it the testator had already used a general term covering the property referred to in the recital together with a specific enumeration of the articles of which that property consisted. The final clause of the description is at least coördinate with the first general reference to the property mentioned in the recital.

Finally, the construction urged by the appellant cannot in any view be said to be clear. We submit that on the contrary the construction urged by the appellee and sustained by both courts below is clearly correct; if, however, there be any doubt as to the correctness of that construction, we submit that the doubt must, under the rule of presumption against partial intestacy, be resolved in favor of the appellee.

Respectfully submitted,

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Attorneys for Appellee.